IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
William C. Whitbeck, Presiding Judge

MARY BAILEY
Plaintiff-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL CENTER
Defendant-Appellant,

and

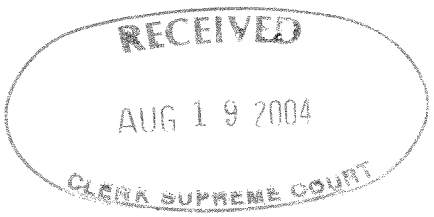
Docket no. 125110

SECOND INJURY FUND
Defendant-Appellee,

and

DIRECTOR OF THE WORKERS' COMPENSATION AGENCY
Intervenor-Appellee.
_____/

BRIEF ON APPEAL - AMICUS CURIAE MUNSON HOSPITAL



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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion that was entered by the Court of Appeals in *Bailey v Oakwood Hosp and Medical Center*, 259 Mich App 298; 674 NW2d 160 (2003) on November 6, 2003, by the authority of the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq. MCL 418.861a(14), second sentence. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 706, 732; 614 NW2d 607 (2000).

STATEMENT OF QUESTION PRESENTED

I

WHETHER ONLY SECTION 911, THIRD SENTENCE, LIMITS THE CIRCUMSTANCES FOR APPLYING SECTION 921, SECOND SENTENCE, OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

Plaintiff-appellee Bailey answers "No."

Defendant-appellant Oakwood answers "Yes."

Defendant-appellee Second Injury Fund answers "No."

Intervener-appellee Director of Agency answers "No."

Amicus curiae Munson answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "No."

STATEMENT OF FACTS

Plaintiff-appellee Mary Bailey (Employee) was certified as vocationally disabled by the Department of Education of the State of Michigan, hired by defendant-appellant Oakwood Hospital and Medical Center (Employer), and received a personal injury arising out of and in the course of employment. (35a) The Employee was then paid weekly workers' disability compensation and the costs of medical care by the Employer for more than the next fifty-two weeks. (35a) Later, the Employer suspended the weekly compensation believing that the Employee was avoiding remunerative employment. (35a)

The Employee then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation[1] to reinstate continuing weekly compensation from the Employer. The Employer appeared and denied responsibility in a carrier's response. (35a)

The Bureau remitted the case to the Board of Magistrates for hearing and disposition. While the claim was pending before the Board, the Employer filed a claim that it was not responsible for any compensation after the first anniversary of the injury and that the benefits which were previously paid to the Employee must be reimbursed by defendant-appellee Second Injury Fund. (35a) The Fund appeared and asked that the Board dismiss the claim by the Employer for failing to give notice of the *likelihood that compensation may be payable beyond a period of 52 weeks after the date of injury* received by the Employee as required by a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., MCL 418.925(1), second sentence. (35a)

The Board dismissed the claim by the Employer against the Fund with the determination that the Employer failed to give the Fund notice before the first anniversary of the injury that it was "likely" that compensation would continue after the first anniversary.

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[1] Later known as the Bureau of Workers' & Unemployment Compensation and now as the Workers' Compensation Agency.

Bailey v Oakwood Hosp and Medical Center, unpublished order and opinion of the Board of Magistrates, decided on October 4, 1999 (Docket no. 100499041). (1a, 5a)

The Workers' Compensation Appellate Commission reversed and remanded the case to the Board with the mandate that the Board join the Fund as a party defendant. *Bailey v Oakwood Hosp & Medical Center*, 2000 Mich ACO #292. (6a, 11a)

On remand, the Board conducted an evidentiary hearing and granted the claim by the Employee but denied the claim by the Employer by ordering the Employer to pay the Employee the continuing weekly compensation and the costs of all medical care. *Bailey v Oakwood Hosp & Medical Center*, unpublished order and opinion of the Board of Magistrates, decided on February 5, 2001 (Docket no. 020501007). (13a, 22a-23a)

The Commission modified the decree of the Board by ruling that the Employer was not responsible for any compensation after the first anniversary of the personal injury that the Employee received. The decree of the Board dismissing the Fund was affirmed. *Bailey v Oakwood Hosp & Medical Center*, 2002 Mich ACO #185. (25a, 32a)

The Court of Appeals granted leave to appeal and allowed the director of the Bureau to participate as an amicus curiae, *Bailey v Oakwood Hosp & Medical Center*, unpublished order of the Court of Appeals, decided on November 14, 2002 (Docket no. 243132) (33a) and reversed and remanded to the Commission for a determination of the question about the accuracy of the decision by the Board that the Employee was not avoiding work which had been mooted by the decision of the Commission. *Bailey v Oakwood Hosp and Medical Center*, 259 Mich App 298, 306-307; 674 NW2d 160 (2003). (38a)

The Court granted leave to appeal and invited Munson Hospital to file a brief amicus curiae on the question of,

> ". . . whether the Court of Appeals properly interpreted MCL 418.921 and MCL 418.925 in *Robinson v General Motors Corp*, 242 Mich App 331 (2000), *Valencic v TPM, Inc*, 248 Mich App 601 (2001), and this case. In discussing this issue,

> the parties should consider the following: (1) whether the imposition of liability on the employer for paying benefits after 52 weeks of disability, in those situations where the Second Injury Fund does not receive statutory notice, is consistent with MCL 418.921's statement that the employer's liability 'shall be limited' to a 52-week period and that responsibility for all later benefits 'shall be the liability of the fund'; (2) whether MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the carrier, not the employer, affects the analysis of this issue; and (3) whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affects the analysis of this issue." *Bailey v Oakwood Hosp and Medical Center*, 470 Mich - ; - NW2d - (2004). (44a)

ARGUMENT

I

ONLY SECTION 911, THIRD SENTENCE, LIMITS THE CIRCUMSTANCES FOR APPLYING SECTION 921, SECOND SENTENCE, OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

Currently, there are five different kinds of disability which are described by six separate statutes in the WDCA. MCL 418.301(4). MCL 418.401(1). MCL 418.361(2)(a) - (l). MCL 418.361(3)(a) - (g). MCL 418.373(1). MCL 418.901(a).

Section 301(4), first sentence, and section 401(1), first sentence, were enacted together on May 14, 1987, by 1987 PA 28 and describe one kind of disability as each state that, "[a]s used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease."

The kind of disability which is described by section 301(4), first sentence, and section 401(1), first sentence, is commonly known as general disability by having application to most of the claims for weekly compensation.

Section 361(2)(a) - (l) first applied on January 1, 1982, after having been enacted by 1980 PA 357 and describes a second kind of disability by stating that,

> "[i]n cases included in the following schedule, the disability in each case shall be considered to continue for the period

specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

(a) Thumb, 65 weeks.

(b) First finger, 38 weeks.

(c) Second finger, 33 weeks.

(d) Third finger, 22 weeks.

(e) Fourth finger, 16 weeks.

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

(f) Great toe, 33 weeks.

(g) A toe other than the great toe, 11 weeks.

The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

(h) Hand, 215 weeks.

(i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

(j) Foot, 162 weeks.

(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(l) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye."

This kind of disability is commonly known as scheduled disability from schedule of the length of disability for each physical loss.

Section 361(3)(a) - (g) was enacted on August 1, 1956, by 1956 PA 195 and describes yet another kind of disability by stating that,

"[t]otal and permanent disability, compensation for which is provided in section 351 means:

(a) Total and permanent loss of sight of both eyes.

(b) Loss of both legs or both feet at or above the ankle.

(c) Loss of both arms or both hands at or above the wrist.

(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).

(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

(f) Incurable insanity or imbecility.

(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury."

This kind of disability is commonly known as total and permanent disability in reference to the statute.

Section 373(1) first applied on January 1, 1982, after having been enacted by 1980 PA 357 and describes the fourth kind of disability by stating that,

"[a]n employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 U.S.C. 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under

> either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4."

This particular kind of disability is commonly known as retiree disability because of the status of employment of the employee to whom the statute applies.

Finally, section 901(a) first applied on July 1, 1972, after having been enacted by 1971 PA 183 and describes the fifth kind of disability by stating that, "'[v]ocationally disabled' means a person who has a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes, and whose impairment is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection."

This particular kind of disability is commonly known as vocational disability in reference to the statute.

Vocational disability is distinct from all of the other kinds of disability. General disability, retiree disability, scheduled disability, and total and permanent disability all may be determined by the Board of Magistrates of the Department of Labor and Economic Growth by authority of a statute in the WDCA which states that, "[a]ny dispute or controversy concerning compensation shall be submitted to the [Workers' Compensation Agency] and all questions arising under this act shall be determined by the [Workers' Compensation Agency] or [the Board of Magistrates], as applicable." MCL 418.841(1), first sentence. Vocational disability may not be considered and decided by the Board of Magistrates of the Department of Labor and Economic Growth by the authority of section 841(1), first sentence. Vocational disability may be considered and may be established only by the Division of Vocational Rehabilitation of the Department of Education because of another statute in the WDCA. MCL 418.905.

Section 905 of the WDCA states that,

> "[a]n unemployed person who wishes to be certified as vocationally disabled for purposes of this chapter shall apply to the certifying agency on forms furnished by the agency. The certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally disabled certification."

The *certifying agency* in section 905 is the Division of Vocational Rehabilitation of the Department of Education as defined by MCL 418.901(b) which states that, "[a]s used in this chapter: '[c]ertifying agency' means the division of vocational rehabilitation of the department of education."

General disability, retiree disability, scheduled disability, and total and permanent disability all may be considered and determined by the Board of Magistrates only after an employee receives a personal injury arising out of and in the course of employment. For example, section 301(4), first sentence, states that, "[a]s used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training *resulting from* a personal injury or work related disease." (emphasis supplied) Vocational disability may never be considered and established after an employee receives a personal injury arising out of and in the course of employment. Vocational disability can be considered and decided only before a personal injury arising out of and in the course of employment happens. Indeed, vocational disability can be considered and decided before employment even starts as section 905 allows an application from only an *unemployed person* by stating that, "[a]n unemployed person who wishes to be certified as vocationally disabled for purposes of this chapter shall apply to the certifying agency on forms furnished by the agency."

The process by the Board for deciding general disability, retiree disability, scheduled disability, and total and permanent disability is adversarial. The Board may consider and decide these four kinds of disability only after the employer has been notified

and provided with an opportunity to appear and contest a claim by an injured employee at an evidentiary hearing. MCL 418.222(1) - (3), (5). MCL 418.847(1). MCL 418.851.

Section 222(3) and (5) require that an injured employee state a claim of a general disability, retiree disability, scheduled disability, or total and permanent disability in an application for mediation or hearing which must describe the time of the injury, the time of the disability, and witnesses, including any attending physicians by stating that,

> "[t]he application for mediation or hearing shall be as prescribed by the bureau and shall contain factual information regarding the nature of the injury, the date of injury, the names and addresses of any witnesses, except employees currently employed by the employer, the names and addresses of any doctors, hospitals, or other health care providers who treated the employee with regard to the personal injury, the name and address of the employer, the dates on which the employee was unable to work because of the personal injury, whether the employee had any other employment at the time of, or subsequent to, the date of the personal injury and the names and addresses of the employers, and any other information required by the bureau."

and

> "[t]he claimant shall notify the carrier of the intention to call witnesses who are currently employed by the employer."

The Workers' Compensation Agency serves the employer with the application for mediation or hearing when satisfied that it is complete and can be answered as section 222(1), first sentence, states that, "the [Workers' Compensation Agency] upon receiving a completed application for mediation or hearing from a claimant, shall forward a copy . . . to the employer and carrier." An incomplete application for mediation or hearing is not served. An incomplete claim is returned to the injured employee. Section 222(1), last sentence, states that, "[a]ny application for mediation or hearing . . . which is determined by the [Workers' Compensation Agency] to be incomplete shall be returned with an explanation of the additional information needed."

Section 222(1), second sentence, and MCL 418.222(4) allow the employer to appear and contest the claim with a carrier's response.

Then and only then can a hearing be scheduled. Section 847(1) states that,

> "[e]xcept as otherwise provided for under this act, upon the filing with the [Workers' Compensation Agency] by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable. A worker's compensation magistrate [of the Board of Magistrates] shall hear a case that is set for hearing."

The hearing is adversarial as the injured employee has the burden of proof to establish the general disability, retiree disability, scheduled disability, or total and permanent disability described in the application for mediation or hearing as section 851, first and second sentences, state,

> "[t]he [Board] at the hearing of the claim shall make such inquiries and investigations as he or she considers necessary. A claimant shall prove his or her entitlement to compensation and benefits under this act by a preponderance of the evidence."

An appeal is available from any decision by the Board about general disability, retiree disability, scheduled disability, or total and permanent disability. Section 851, last sentence. MCL 418.861a(1).

Vocational disability is considered and decided by an inquisitorial process. Section 905, second sentence, directs *an investigation* by the Division of Vocational Rehabilitation of the Department of Education by stating that, "[t]he certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally disabled certification."

The rules promulgated by the director of the Division of Vocational Rehabilitation of the Department of Education that are authorized by MCL 418.915 all are focused on the scope of a unilateral or inquisitorial investigation.

Certainly, there is no statute in the WDCA and there is no rule promulgated by the director of the Division of Vocational Rehabilitation of the Department of Education that actually requires or even implies that notice must be given to anyone or that someone

may appear and oppose a claim of vocational disability. Similarly, there is no statute in the WDCA and there is no administrative rule promulgated by the director of the Division of Vocational Rehabilitation of the Department of Education that actually allows or even implies that a decision about vocational disability may be reheard or appealed.

Plainly, the markers of an adversarial process of notice, an opportunity to appear and contest, an evidentiary hearing at which the claimant has the burden of proof, and an opportunity to challenge a decision are all present when an injured employee claims general disability, retiree disability, scheduled disability, or total and permanent disability. And all are absent when there is a claim of vocational disability.

Finally, general disability, retiree disability, scheduled disability, and total and permanent disability all have the same purpose of establishing the eligibility of an injured employee to weekly compensation, the amount of the weekly compensation, and the duration of that weekly compensation. MCL 418.301(5)(b) and (c). MCL 418.351(1). Section 361(2). MCL 418.521(2).

Section 301(5) allows weekly compensation for an injured employee having a general disability by stating that, "[i]f disability is established pursuant to subsection (4) [i.e., section 301(4), first sentence], entitlement to weekly wage loss benefits shall be determined pursuant to this section . . ." Section 301(5)(b) and (c) describe the amount of the weekly compensation,

> "[i]f an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355."

and

> "[i]f an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage

> the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment."

Section 351(1), first sentence, allows weekly compensation for an injured employee having a retiree disability by stating that,

> "[w]hile the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355."

Section 361(2) establishes that an injured employee may be eligible for weekly compensation and describes the duration of that eligibility for a scheduled disability,

> "[i]n cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> (a) Thumb, 65 weeks."

Total and permanent disability establishes the eligibility of an injured employee to weekly compensation from the employer, the amount and duration of that benefit, and the eligibility of an augmentation from the Second Injury fund because of section 521(2) which states that,

> "[a]ny permanently and totally disabled person as defined in this act, if such total and permanent disability arose out of and in the course of his employment, who, on and after June 25, 1955, is *entitled to receive* payments of workmen's compensation in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability, and for a lesser number of weeks than the duration of such permanent and total disability, after the effective date of any amendatory act by which his disability is defined as permanent and total disability, or by which the weekly benefits for permanent and total disability are increased, shall receive weekly from the carrier on behalf of the second injury fund differential benefits equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act as the same was in effect at the time of his injury, and the amounts now

> provided for his permanent and total disability by this or any other amendatory act, with appropriate application of the provisions of sections 351 to 359. Such payments shall continue after the period for which the person is otherwise entitled to compensation under this act for the duration of the permanent and total disability. Any payments so made by a carrier pursuant to this section shall be reimbursed to the carrier by the second injury fund as provided in this chapter." (emphasis supplied)

Another statute in the WDCA precludes the adjustment or coordination of base weekly compensation from the employer by the amount of group insurance, wage continuation benefits, or retirement income. MCL 418.354(1), second sentence.

Vocational disability does not have the purpose of establishing or limiting the rights of an injured employee. Indeed, a statute in the WDCA actually establishes that an employee having a vocational disability has the very same rights to weekly compensation as any other employee who receives a personal injury arising out of and in the course of employment that produces one or another of the four other kinds of disability. MCL 418.921. Section 921, first sentence, states that,

> "[a] person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation *in the manner and to the extent provided in this act*, or in case of his death resulting from such injury, the compensation shall be paid to his dependents." (emphasis supplied)

Vocational disability does have the express purpose of describing and limiting the responsibilities of the employer of an employee with a vocational disability. Section 921, second sentence, actually limits the responsibility of an employer to the year after an employee with a vocational disability has a personal injury arising out of and in the course of the employment by stating that,

> "[t]he liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury."

This limit of responsibility has one and only one qualification. A particular statute in the WDCA precludes applying this limit when an employer does not provide the Division of Vocational Rehabilitation of the Department of Education with information about the employment before the time that the employee with a vocational disability receives a personal injury arising out of and in the course of employment. MCL 418.911. Section 911 states, in full,

> "[u]pon commencement of employment of a certified vocationally disabled person the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency. The certifying agency shall acknowledge receipt of the information. Failure to file the required information with the certifying agency within 60 days after the first day of the vocationally disabled person's employment precludes the employer from the protection and benefits of this chapter unless such information is filed before an injury for which benefits are payable under this act."

Section 911, first sentence, is altogether plain. Section 911, first sentence, requires a specific person, *the employer*, to take specific action, *submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency*, at a specific time, *upon commencement of employment of a [vocationally disabled] person*."

Section 911, last sentence, is equally plain and makes section 911, first sentence, effective as a law by describing a sanction for the failure to fulfill the prescription which is *precludes the employer from the protection and benefits of this chapter.*

The sanction of section 911, last sentence, is sensible because the employer is the only person who has any benefit or protection by the application of section 921, second sentence. It would be insensible to sanction the employee because the employee has no benefit and has no protection from having a vocational disability. Section 921, first sentence.

A court may not imply any other sanction for the failure of an employer to fulfill the requirements of section 911, first sentence, or any other statement in any other

statute. *Sebewaing Ind, Inc v Village of Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953). *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971). *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972). *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561; 592 NW2d 360 (1999). The Court held in the case of *Sebewaing Ind, Inc, supra*, 545,

> "[t]hat which is expressed puts an end to or renders ineffective that which is implied. *Galloway v. Holmes*, 1 Doug (Mich) 330. So stated in the opinion of 4 members of this Court, the other concurring in the result, in *Taylor v. Public Utilities Commission*, 217 Mich 400 (PUR1922D, 198). *Expressio unius est exclusio alterius*. Express mention in a statute of one thing implies the exclusion of other similar things. *Perry v. Village of Cheboygan*, 55 Mich 250; *Weinberg v. Regents of the University of Michigan*, 97 Mich 246; *Marshall v. Wabash Railway Co.*, 201 Mich 167 (8 ALR 435); *Taylor v. Public Utilities Commission, supra*; *Van Sweden v. Van Sweden*, 250 Mich 238."

The Court has always applied this principle stating in the case of *Stowers, supra*, 133,

> "Michigan has recognized the principal of *expressio unius est exclusion alterious*—express mention in a statute of one thing implies the exclusion of other similar things. *Dave's Place, Inc.*, v. *Liquor Control Comm.* (1936), 277 Mich 551; *Sebewaing Industries, Inc.*, v. *Sebewaing* (1953), 337 Mich 530."

In the case of *Alan, supra*, 253,

> ". . . the principle of *expressio unius est exclusio alterius*, this is another reason why the stadium bonds do not qualify under Act 94. *Sebewaing Industries, Inc v Village of Sebewaing*, 337 Mich 530, 545 (1953)."

and in the case of *Hoste, supra*, 572, n 8,

> "[8] The conclusion that the subsection supercedes the common law is based on the doctrine of *expressio unius est exclusio alterius* ('express mention in a statute of one thing implies the exclusion of other similar things.' *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 [1971]). In this case, the express mention of some of the factors of the economic realities test in subsection 161(1)(d) implies the exclusion of the factors not mentioned."

The principle that a court should not imply any text when the Legislature has actually expressed the rule with a statute is only a variant of the core principle that a court may not add or subtract from the text of a statute. *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002). *People v Barbee*, 470 Mich 283; - NW2d - (2004). *Mayor of the City of Lansing v Michigan Pub Service Comm*, 470 Mich 154; - NW2d - (2004). In the case of *Robertson, supra*, 748, the Court said that,

> ". . . this Court's primary purpose is to discern and give effect to the Legislature's intent. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). The first criterion in determining intent is the specific language of the statute. *DiBenedetto, supra* at 402. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. *Id.* Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning. See MCL 8.3a. See also *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997)."

The foundation of the rule in *Sebewaing Ind, Inc, supra*, that the expression of a rule in a statute precludes implying any other rule by the court which is commonly known as expressio unius and the rule in *Robertson, supra*, that a statute must be enforced by an application as written is grounded upon the most profound principle of the authority of a court. The Court held in the case of *Mayor of the City of Lansing, supra*, 161, 164-165, that,

> "[o]ur task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.
>
> * * *

> . . . the best measure of the Legislature's intent is simply the words that it has chosen to enact into law. Among other salutary consequences, this approach to reading the law allows a court to assess not merely the intentions of one or two highlighted members of the Legislature, but the intentions of the *entire* Legislature.
>
> (3) The dissent avoids the difficult task of having to read the actual language of the law and determine its best interpretation by peremptorily concluding that MCL 247.183 is 'ambiguous.' *Post* at 174. A finding of ambiguity, of course, enables an appellate judge to bypass traditional approaches to interpretation and either substitute presumptive 'rule[s] of policy,' see *Klapp v United Ins*, 468 Mich 459, 474; 663 NW2d 447 (2003), quoting 5 Corbin, Contracts (rev ed, 1998), § 24.27, p 306, or else to engage in a largely subjective and perambulatory reading of 'legislative history.' However, as *Klapp*, relying on the treatises of both Corbin and Williston, concluded, a finding of ambiguity is to be reached only after 'all other conventional means of [ ] interpretation' have been applied and found wanting. *Klapp, supra* at 474. Where the majority applies these conventional rules and concludes that the language of MCL 247.183 can be reasonably understood, the dissent, without demonstrating the flaws of the majority's analysis except to assert that its opinion is not in accord with the 'true intent' of the Legislature, opines that an 'ambiguity' exists. An analysis, such as that of the dissent, that is in conflict with the actual language of the law and predicated on some supposed 'true intent' is necessarily a result-oriented analysis. In other words, it is not a legal analysis at all."

As indicated, section 911, last sentence, describes the one and the only qualification for applying the limitation of the employer for compensation to an injured employer with a vocational disability established by section 921, second sentence.

A. THE NOTICE FROM A CARRIER TO THE SECOND INJURY FUND WHICH IS REQUIRED BY SECTION 921, SECOND SENTENCE, IS NOT A CIRCUMSTANCE FOR APPLYING SECTION 921, SECOND SENTENCE.

A statute in the WDCA directs an employer to communicate with the Second Injury Fund about an employee with a vocational disability. MCL 418.925(1). Section 925(1), second sentence, states that, "[n]ot less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the [second

injury] fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury."

The reason for this notice from the employer is to allow the Second Injury Fund an opportunity to make an informed decision about recognizing or contesting the eligibility of an injured employer before the end of the responsibility of the employer at the first anniversary. Section 925(1), third sentence, allows the Second Injury Fund access to the information needed to make an intelligent decision by stating that, "[t]he [second injury] fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability."

The two statutes that follow describe the choice available to the Second Injury Fund after receiving and considering all of the information gathered from the employer by the authority of section 925(1), third sentence. MCL 418.925(2). MCL 418.931(1). Section 925(2), first sentence, actually allows the Second Injury Fund the choice to recognize responsibility for compensation to the employee after the first anniversary of the injury,

> "[i]f the fund does not notify the carrier of its intent to dispute the payment of compensation, the carrier shall continue to make payments on behalf of the fund, and shall be reimbursed by the fund for all compensation paid and pertaining to the period beyond 52 weeks after the date of injury."

Section 931(1) allows the Second Injury Fund to deny responsibility for compensation and have a hearing about the eligibility of the employee,

> "[i]f an employee was employed under the provisions of this chapter and a dispute or controversy arises as to payment of compensation or the liability therefor, the employee shall give notice to, and make claim upon, the employer as provided in chapters 3 and 4 and apply for a hearing. On motion made in writing by the employer, the director, or the worker's compensation magistrate to whom the case is assigned, shall join the fund as a party defendant."

Section 925(1), second sentence, does not qualify or limit the application of section 921, second sentence. There is no text in section 925(1) that references or tie-bars section 921, second sentence. There is no text in section 921 that references or tie-bars

section 925(1). There is no text in any statute in the WDCA which references or tie-bars section 921, second sentence, to section 925(1), second sentence.

The purpose of the two statutes is entirely different. The purpose of section 921, second sentence, is to end the responsibility of an employer for compensation at a specific time, i.e., the first anniversary of a personal injury arising out of and in the course of employment, in a specific circumstance, i.e., the employee was already vocationally disabled when injured by work.

The purpose of section 925(1), second sentence, is divorced from this purpose of section 921, second sentence. Again, the purpose of section 925(1), second sentence, is to allow the Second Injury Fund an opportunity to recognize or contest *its* responsibility to the *injured employee*.

A failure of the employer to provide the Second Injury Fund with the notice charged by section 925(1), second sentence, or the information *regarding the accident, and the nature and extent of the injury and disability* charged by section 925(1), third sentence, cannot prejudice the Second Injury Fund as a matter of law. The Second Injury Fund may always dispute its responsibility to the injured employee and may always have an evidentiary hearing about that. Section 925(2), second and third sentences, explicitly reserve the *right to contest* after the first anniversary of the injury received by the employee by stating that,

> ". . . at any time subsequent to 52 weeks after the date of injury, the fund may notify the carrier of a dispute as to the payment of compensation. The liability of the fund to reimburse the carrier shall be suspended 30 days thereafter until such controversy is determined."

And a full evidentiary hearing must be convened with the active participation of the Second Injury Fund and resolved with a written decree by the Board of Magistrates as MCL 418.931(3), (4), and (5) state,

> "[t]he [Second Injury Fund], named as a defendant pursuant to motion, shall have 10 days after the date of mailing of notice of joinder to file objection to being named a party defendant. On the date of hearing at which the liability of the parties is

> determined, the [Board of Magistrates] first shall hear arguments and take evidence concerning the joinder as party defendant. If the [Second Injury Fund] has filed a timely objection, and if the argument and evidence warrant, the [Board of Magistrates] shall grant a motion to dismiss.
>
> * * *
>
> At the time of the hearing, the employer and the [Second Injury Fund] may appear, cross-examine witnesses, give evidence, and defend both on the issue of liability of the employer to the employee and on the issue of the liability of the fund.
>
> * * *
>
> The [Board of Magistrates] shall enter an order determining the respective liability of the employer and the [Second Injury Fund]."

B. *CARRIER* IN SECTION 925(1), SECOND AND THIRD SENTENCES, 925(2), AND 925(3) INCLUDES *EMPLOYER* IN SECTION 921, SECOND SENTENCE.

A statute in the WDCA defines *carrier* in section 925(1), second and third sentences. MCL 418.601(c). Section 601(c) states that, "[w]henever used in this act: '[c]arrier' means a self-insurer or an insurer."

The same statute in the WDCA defines *self-insurer* and *insurer*. MCL 418.601(a), (b). These statutes state that,

> "[w]henever used in this act:
>
> (a) 'Insurer' means an organization that transacts the business of worker's compensation insurance within this state.
>
> (b) 'Self-insurer' means either of the following:
>
> (*i*) An individual employer authorized to carry its own risk.
>
> (*ii*) A group of employers who pool their liabilities under this act as a group fund in the manner provided in section 611."

These definitions apply to the term *carrier* in section 925(1), second and third sentences, because of the text *whenever used in this act* in section 601.

The Court may not use the common and approved usage of the language to define *carrier* because that standard established by MCL 8.3a cannot apply when a statute

provides a specific definition. *People v Smith*, 246 Mich 393; 224 NW 402 (1929). *S W Butterfield Theatres, Inc v Dept of Revenue*, 353 Mich 345; 91 NW2d 269 (1958). *People v Denio*, 454 Mich 691; 564 NW2d 13 (1997). The Court held in the case of *S W Butterfield Theatres, Inc, supra*, 349-350, that,

> "[w]ith a range of meanings so diverse, and shades of meaning so abstruse, varying, indeed, with statutory purpose, as we range fields of law from the criminal to the commercial to the governmental, not surprising is it that we find our statute 'supplying its own glossary.' Cardozo, J., in *Fox* v. *Standard Oil Company, supra*, 95. We are not left dependent upon dialect, colloquialism, the language of the arts and sciences, or even the common understanding of the man in the street. We have the act itself. We need not, indeed we must not, search afield for meanings where the act supplies its own."

More recently, the Court said the same in *Denio, supra*, 699, "when terms are not expressly defined by a statute, a court may consult dictionary definitions."

The definition of *carrier* in section 925(1), second sentence, as a *self-insurer* which is *an individual employer authorized to carry its own risk* or *an insurer* which is *an organization that transacts the business of worker's compensation insurance within this state* by applying section 601(a) - (c) does not conflict with *employer* in section 921, second sentence.

Another statute in the WDCA defines *employer*. MCL 418.131(2). Section 131(2) states that, "'employer' includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract."

Plainly, just as *carrier* means an employer or the workers' disability compensation insurance company of an employer by section 601(a) - (c), *employer* means an employer or the workers' disability compensation insurance company of an employer by section 131(2).

There is no ambiguity in *employer* in section 921, second sentence, or *carrier* in section 925(1), second sentence, because the two are synonyms when the statutory definitions of each are considered and applied. See, *Mayor of the City of Lansing, supra*, 166,

> "[t]he law is not ambiguous whenever a dissenting (and presumably reasonable) justice would interpret such law in a manner contrary to a majority. Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have concluded that the law is 'ambiguous,' and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous. Rather, a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, id. at 467, or when it is *equally* susceptible to more than a single meaning." (emphasis supplied)

See also, *Denio, supra*, 699,

> ". . . if a statute is susceptible to more than one interpretation, we must engage in judicial construction and interpret the statute. *Id.*; *Piper v Pettibone Corp*, 450 Mich 565, 571; 542 NW2d 269 (1995). Furthermore, a statute that is unambiguous on its face can be ' 'rendered ambiguous by its interaction with and its relation to other statutes.' ' *People v Jahner*, 433 Mich 490, 496; 446 NW2d 151 (1989), quoting 2A Sands, Sutherland Statutory Construction, § 46.04, pp 86-87."

C. *ROBINSON v GEN MOTORS CORP*, 242 MICH APP 331; 619 NW2d 411 (2000) AND *VALENCIC v TPM, INC*, 248 MICH APP 601; 639 NW2d 846 (2001) MUST BE OVERRULED.

The Court of Appeals ruled in the case of *Robinson v Gen Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), lv den 463 Mich 975; 623 NW2d 602 (2001) that the failure of an employer to provide the Second Injury Fund with the notice *that compensation may be payable beyond a period of 52 weeks after the date of injury* as required by section 925(1), second sentence, barred reimbursement of the weekly compensation that had been paid to the injured employee after the first anniversary of the personal injury. The Court of Appeals based this on the notion that the failure had abbreviated the time available for the Second Injury Fund to secure and evaluate the

information about the injury and the disability for which weekly compensation was paid. The Court of Appeals actually said in the case of *Robinson, supra*, 335, that,

> ". . . under the statute, the [Second Injury Fund] was entitled to review information regarding the accident and the nature and extent of the injury and disability. Presumably, if the employer fails to give notice or gives tardy notice of the . . . impending obligations, then the time during which the [Second Injury Fund] can review the carrier's information regarding the employee's accident, injury, and disability is shortened.
>
> In short, although subsection 925(1) is silent regarding the consequences of an employer's failure to give notice to the fund during the period prescribed by the statute, the WCAC properly construed the statute to find that dismissal of the [Second Injury Fund] as a party from this case was proper."

The Court of Appeals was wrong in failing to appreciate that the time for securing and gathering the information from the employer to decide whether to recognize or contest the responsibility for compensation after the first anniversary of the injury to the employee was not and could not be abbreviated by a failure of the employer to provide notice within the time that was prescribed by section 925(1), second sentence. Section 925(2), second sentence, allows the Second Injury Fund to contest the responsibility for compensation at any time after the first anniversary of the injury to the employee which is the very earliest that it has any potential responsibility,

> ". . . *at any time* subsequent to 52 weeks after the date of injury, the fund may notify the carrier of a dispute as to the payment of compensation. The liability of the fund to reimburse the carrier shall be suspended 30 days thereafter until such controversy is determined." (emphasis supplied)

Indeed, the Court of Appeals was remiss in the assumption that an employer always had information *regarding the accident, and the nature and extent of the injury and disability* which could be provided to the Second Injury Fund after having given notice per section 925(1), second sentence. The particular facts in the case of *Robinson, supra*, reveal how an employer may not have information within the time described by section 925(1),

second sentence. In the case of *Robinson, supra*, 332, the Court of Appeals reported the facts,

- the employee had vocational disability
- the employee received a work-related personal injury on April 8, 1992
- the employer first learned the claim for compensation on November 19, 1992
- the employer denied responsibility until March 11, 1993
- the employer asked for reimbursement from the Second Injury Fund on April 22, 1993

Specifically, the Court of Appeals recited these facts in *Robinson, supra*, 332, by stating that,

> ". . . a GM employee certified as vocationally disabled, MCL 418.901(a); MSA 17.237(901)(a), was injured on April 8, 1992, and sought worker's disability compensation on September 30, 1992. GM received the claim on November 19, 1992, and disputed it. However, on March 11, 1993, plaintiff and GM entered into a voluntary payment agreement. On April 22, 1993, GM wrote the fund describing its voluntary payment agreement with plaintiff and requesting reimbursement."

Plainly, this left the employer 58 days before the time to give notice to the Second Injury Fund expired (there are 58 days until 90 days before the anniversary of the injury on April 8, 1992). During those 58 days, the employer did not investigate and recognize the responsibility for compensation. Instead, the employer denied all responsibility for all compensation. It was only after the time to give notice to the Second Injury Fund expired did the employer accept responsibility and begin to pay compensation to the employee.

More extreme examples occur all the time. An employee could have a personal injury on January 1, 2001, and not file a claim for compensation until January 1, 2003, MCL 418.381(1), and years after the expiration of that time to notify the

Second Injury Fund by the terms of section 925(1), second sentence. See, *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2001), lv den 467 Mich 916 (2002).

It is this phenomena that an employer may not even know of a claim for compensation by a vocationally disabled employee until long after the time to give the Second Injury Fund notice which explains the absence of a sanction in section 925(1), second sentence.

The case law which was relied upon by the Court of Appeals for implying a sanction does not apply. The Court of Appeals cited *McAvoy v H B Sherman Co*, 401 Mich 419; 258 NW2d 414 (1977), reh den, motion for remand, grtd, 402 Mich 953 (1977) as the authority for implying a penalty of dismissal of the claim by the employer for repayment of compensation by the Second Injury Fund by stating in *Robinson, supra*, 335, "the sanction of dismissal is necessarily implied from the statute. *McAvoy v H B Sherman Co*, 401 Mich 419; 258 NW2d 414 (1977)."

The ruling by the Court in the case of *McAvoy, supra*, does not apply because the statute which was considered in the case is profoundly different from section 925(1), second sentence. In the case of *McAvoy, supra*, the Court considered a statute in the WDCA which requires an employer to pay a part of the weekly compensation ordered by the Board of Magistrates during an appeal to the Workers' Compensation Appellate Commission, MCL 418.862(1). Then, as now, section 862(1), first, second, and third sentences, state that,

> "[a] claim for review filed pursuant to section 859, 859a, 860, 861, or 864(11) shall not operate as a stay of payment to the claimant of 70% of the weekly benefit required by the terms of the award of the [Board of Magistrates] or arbitrator. Payment shall commence as of the date of the . . . award, and shall continue until final determination of the appeal or for a shorter period if specified in the award. Benefits accruing prior to the award shall be withheld until final determination of the appeal."

There were and are two important features to section 862(1). One, there was and remains no text in section 862 or in any statute of the WDCA describing any sanction for non-compliance. The other, the payment of the interim appeal benefit which is also

known as the 70% benefit is a jurisdictional prerequisite to filing a claim for review. *McAvoy, supra*, 461, "the 70% statute operates as a condition precedent for the perfection of an appeal."

The Court in the case of *McAvoy, supra*, correctly held that dismissal was required because there was a failure to establish jurisdiction. It is well established that a court which does not have jurisdiction can only dismiss a case presented to it. *Fox v Bd of Regents of the Univ of Mich*, 375 Mich 239, 242; 134 NW2d 146 (1972). In the case of *Fox, supra*, 242, the Court said that,

> "[j]urisdiction and venue are not the same thing. Lack of proper venue under the new General Court Rules can be corrected by transfer of a cause to the proper forum; lack of jurisdiction cannot.
>
> When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.
>
> In *In re Estate of Fraser*, 288 Mich 392, this Court said (p 394):
>
> 'Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding.'
>
> 7 MLP, Courts, § 24, p 627, is to the same effect:
>
> 'Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void."

Section 925(1), second sentence, is like section 862(1), first, second, and third sentences, in that it has no actual sanction for fulfillment or disobedience. However, section 925(1), second sentence, is not at all like section 862(1), first, second, and third sentences, because it is NOT a prerequisite to establishing and maintaining the jurisdiction of the Board of Magistrates. And that difference precludes the implication of the power to dismiss which could occur in *McAvoy, supra*.

The Court of Appeals considered two distinct questions in the case of *Valencic, supra*. The first question was with the application of the qualification of the application of section 921, second sentence, which is established by the text of section 911. The Court of Appeals said in *Valencic, supra*, 605-606, 607, that,

> ". . . under MCL 418.911, if the employer does not file certification forms with the [Second Injury Fund] upon the commencement of employment of a certified vocationally disabled employee or before an injury occurs, the employer is precluded from the protection of MCL 418.921.
>
> In the case at bar, there is no dispute that plaintiff is a certified vocationally disabled employee. The issue is whether plaintiff's employer complied with the requirement of filing the certification forms."

and

> ". . . the precise issue presented here is whether the certification form that was submitted in the instant case was sufficient to satisfy that mandatory requirement."

The Court of Appeals decided that the employer *had* fulfilled the only requirement in the only statute in the WDCA qualifying the application of section 921, second sentence, because the names of the employer were pseudonyms,

> ". . . in light of the fact that the names West Highland and TPM are used interchangeably, and in the absence of any authority that renders the WCAC's decision an error of law, we are simply not persuaded that the [Second Injury Fund] is entitled to any relief . . ." *Valencic, supra*, 607.

The Court of Appeals then went on to decide whether section 925(1), second sentence, could apply to qualify the application of section 921, second sentence, and decided that it did,

> "[n]ext, the [Second Injury Fund] claims that [the employer] failed to comply with MCL 418.925(1), which states, in part:
>
> > Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury.

* * *

> We find nothing in the rest of MCL 418.925(1) that specifically limits the notice requirement therein to situations where the benefits are voluntarily paid, nor anything in MCL 418.931 that specifically limits its application to situations where there is a dispute concerning the payment of benefits. Therefore, to the extent the WCAC concluded that MCL 418.925(1) was inapplicable to the instant case, it committed an error . . ." *Valencic, supra*, 607, 609

The mistake by the Court of Appeals in the case of *Valencic, supra*, was even considering the second question. With the decision that the employer had fulfilled the requirement of reporting to the Division of Vocational Rehabilitation of the Department of Education established by section 911, *Valencic, supra*, 607, section 921, second sentence, applied to end the responsibility of the employer for compensation at the first anniversary of the injury to the employee. Entertaining any further question such as interposing section 925(1), second sentence, plainly violated the rule of adding text where there was none and connecting or tie-barring two statutes which have two different purposes.

Robinson supra, and *Valencic, supra*, must be overruled.

RELIEF

Wherefore, amicus curiae Munson Hospital prays that the Court reverse the opinion of the Court of Appeals in *Bailey v Oakwood Hosp and Medical Center*, 259 Mich App 298; 674 NW2d 160 (2003).

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